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Supreme Court, U.S.
FILED

No. 08-171

AUG 6 - 2008

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In The
Supreme Court of the United States

KATHY CONNER,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 6, 2008

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in affirming the District Court decision dismissing Plaintiff's age discrimination case for failure to state a claim upon which relief can be granted.

2. Whether the Plaintiff presented sufficient evidence to create a genuine issue of material fact that age was a motivating factor in State Farm's decision not to advance her to the candidate pool.

3. Whether State Farm's failure to offer an alternative explanation for the age disparity in its hiring results created an inference of discrimination.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kathy Conner respectfully prays that a Writ of Certiorari issue to review the decision of the Sixth Circuit Court of Appeals entered on April 9, 2008.

OPINIONS BELOW

The opinion of the District Court for which this petition is filed is 1:03cv195-R and the Sixth Circuit Court of Appeals decision is 06-5843, 06-5852. The opinions are attached to the appendix.

JURISDICTION

The District Court entered its order on April 24, 2006 and June 12, 2006. An appeal was filed in the Sixth Circuit Court of Appeals, Case No. 06-5843, 06-5852. Decision was rendered in the Sixth Circuit Court of Appeals on April 9, 2008. A petition for rehearing was denied on May 8, 2008. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Kentucky Civil Rights Act provides:

> [I]t is unlawful for an employer to fail or refuse to hire, or discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person

> is a qualified individual with a disability or because the individual is a smoker or non-smoker, as long as the person complies with any workplace policy concerning smoking.

KY. REV. STAT. ANN. § 344.040(1) (Baldwin 2007).

STATEMENT OF THE CASE

In *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492 at 495 (Ky. 2005), when seeking to establish a discrimination claim through circumstantial evidence, the Kentucky courts have adopted the shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In this case, the Sixth Circuit held that the District Court did not err in dismissing Conner's action for failure to state a claim upon which relief can be granted in her action for age discrimination against State Farm Insurance.

1. Kathy Conner, age 47 years, had been working as an office manager for a State Farm agent since 1981. In October, 2002, Robert Teague, the State Farm agent at that time, decided to step down from his position.

2. Conner informed Teague that she wanted to apply for an agent position and began the multi-stage selection process. Conner participated in the screening phase and panel interview. The interview process also involved a "Group Average Scoring Sheet" and subjective impressions from the candidate interview; a determination was made as to whether the interviewee would move forward in the approved candidate pool.

3. Conner and fourteen other candidates went through the screening process. Conner, who was forty seven (47) at the time, was not selected for the approved candidate pool. The positions for which Conner applied for where subsequently awarded to Lisa Beard, age thirty six (36) and Wade Flowers, age thirty five (35).

4. Following State Farm's decision, Conner resigned her position at the Albany office and brought suit against State Farm. State Farm removed the case based on diversity jurisdiction and filed a Motion for Summary Judgment which was initially denied because Conner had established a prima facie case of age discrimination.

5. After additional discovery, the Court renewed State Farm's Motion for Summary Judgment and granted the motion stating that even viewed in the light most favorable to Conner, she had failed to provided sufficient evidence to present a genuine issue of a material fact.

6. A subsequent motion to alter the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The motion was denied and Conner timely appealed the decision to grant State Farm's motion for Summary Judgment.

7. The Sixth Circuit reviewed the District Court decision de novo and found that Conner's evidence was insufficient to rebut State Farm's articulated reason for not selecting Conner was pretextural.

8. The sole issue before the court was whether Conner presented evidence sufficient to permit a jury to find that State Farm's stated basis for eliminating her from its selection process was pretext for unlawful age discrimination.

a. The Court went further to state that Conner must therefore, "set forth evidence from which a reasonable juror could reject State Farm's explanations for its failure to select Conner as an approved candidate and infer that State Farm instead made its decision on the basis of Conner's age.

b. The panel concluded that after reviewing the record as a whole, the district court did not err in finding that Conner failed to demonstrate pretext. Even though Conner presented evidence to establish that she was more qualified than Beard or Flowers. Her evidence consisted of Conner's twenty plus years of experience and affidavits from work colleagues, testimony from her immediate supervisor, Teague of her competence in performing her duties as office manager, reliance on her for input regarding personnel decisions and marketing plans; her skills in training new employees and her receipt of regular performance bonuses. Conner's also received an extremely positive review of her work during the application process by Elwood Ervin, State Farm Agent.

c. Conner's statistical evidence of disparity based on age was deemed not to support her position because it failed to eliminate the most common non-discriminatory explanation for the disparity and it included data from decision makers not a part of the hiring process. Conner's statistical evidence showed a

significant disparity for candidates that were over the age of forty (40) and they were only half as likely to be successful in the application procedure as people under the age of forty (40). State Farm provided no explanation for the disparity.

d. Regarding preferential treatment, the Sixth Circuit found that the final decision maker, Brooks did not give any preferential treatment to the younger applicant, Beard. The younger applicant did receive help with the application process from Dillahay and Teague, members of the hiring team who made recommendations to Brooks about which candidates should move forward in the hiring process for the candidate pool.

e. The court also considered whether the district court overstepped its bounds by examining the reasonableness of State Farm's business decision by concluding that their business decision not to move her forward in the candidate pool, was in fact reasonable. The appellate court concluded that there was an inappropriate weighing of evidence by the district court at the summary judgment stage, however, the appellate court still found that Conner failed to present evidence sufficient to permit a jury to find that the business decision was pretext for unlawful age discrimination.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision not to let this case proceed to jury trial is inconsistent with the court's decision in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). In its totality, Conner offered

sufficient evidence from which a jury could infer that State Farm's stated reasons for the decision was pretextural. State Farm offered no explanation for the statistical disparity in its hiring results regarding candidates over forty (40); acknowledged preferential treatment by individuals involved in the hiring decision and the court weighed factors that should have been left for a jury. To affirm the grant of summary judgment would allow employers to discriminate against an individual in a protected class based on the reasonableness of their business judgment. This undermines the court's shifting burden analysis established in *McDonnell Douglas v. Green*, supra.

I. The Sixth Circuit erred in its analysis of *McDonnell Douglas v. Green* to Plaintiff's age discrimination claim against State Farm.

As movant for a summary judgment, State Farm, has the burden of showing an absence of any genuine issue of material fact and that they are entitled to a judgment as a matter of law. All inferences that can be drawn from undisputed facts must be viewed in the light most favorable to the non-moving party, Conner. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Macy v. Hopkins County School Board of Education*, 484 F.3d 357 (6th Cir. 2007). Issues of disputed fact may not be resolved on a motion for summary judgment. *Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976).

In her complaint, Conner alleged that she was the victim of age discrimination pursuant to the Kentucky Civil Rights Act, KY. REV. STAT. ANN. § 344.040(1).

(Baldwin 2007). Her proof of age discrimination was by circumstantial evidence. *Kentucky Department of Corrections v. McCullough*, 124 S.W.3d 130 (Ky. 2003). Kentucky follows the burden shifting analysis described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Therefore, Conner established that she belonged to the statutorily protected aged group; that she performed the job satisfactorily and nonetheless she was passed over for the opportunity to become a State Farm agent. She was not allowed as a member of the candidate pool used to consider persons for the agent position. Fourteen other persons went through the multi-stage selection process and two individuals were hired out of that process, both candidates were younger than Conner and under the age of forty (40). Under *McDonnell Douglas*, she has met her initial burden. Id.

At this point, the burden shifted to the employer, State Farm to articulate with clarity and reasonable specificity a reason unrelated to the discriminatory motive. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697 (Ky. Ct. App. 1992); *McDonnell Douglas v. Green*, supra. State Farm's articulated non discriminatory reason was that she performed poorly in her interview and the interview was the sole basis of the decision. *Browning v. Dep't of the Army*, 436 F.3d 692 (6th Cir. 2006), and *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492 (Ky. 2005), establish that Connor must demonstrate the following to prevail on the pretext. She must show that State Farm's reason for not selecting her had (1) no basis in fact; (2) the stated reasons did not actually motivate State Farm's challenged conduct or (3) the stated reasons were insufficient to warrant the challenged conduct.

a. Standard for Pretext

Per *Macy v. Hopkins County*, supra, at the summary judgment stage, Conner's burden was merely to present evidence from which a reasonable jury could conclude that she suffered an adverse employment action under circumstances which give rise to an inference of unlawful discrimination. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (6th Cir. 1994) states that Conner must "indict the credibility of her employer's explanation by showing circumstances that tend to prove that an illegal motivation was more likely than the motivation offered." Id. To that end, Conner presented performance evaluations by her co-workers, testimony by her direct supervisor, Teague, Dillahay and by Elwood Ervin, a State Farm agent involved in the multi stage hiring process. All affidavits and testimony indicated that Conner was more than competent in the performance of her responsibilities than the younger candidates

1. Preferential treatment of younger applicants

Wade Flowers and Lisa Beard received preferential treatment in the form of assistance in developing their business plans and advice on how to prepare for the in person interviews. Conner requested assistance with both aspects of the hiring process, but did not receive any help or coaching. Beard even had the benefit of a concealed meeting with the hiring manager Dillahay. A jury could conclude that the higher ratings for these candidates were as a result of the preferential treatment they received in the hiring process and circumstantial evidence of discrimination. *Goden v.*

Runyon, 885 F. Supp. 1104 (W.D. Tenn. 1995); *Manzer v. Diamond Shamrock Chem. Co.*, supra; *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 1999). Conner's evidence of preferential treatment to younger applicants was as follows:

- The hiring decision maker provided assistance to Wade Flowers in the form of a review of his emailed Business Plan and made corrections to that plan.

- Hiring decision maker made recommendations to Flowers on using Zig Zigler tapes to enhance interview performance.

- Lisa Beard had meetings in the office with Ralph Dillahay, another decision maker and she also had meetings with Teague, the retiring agent.

- Lisa Beard was also given inside information regarding her business plan.

- All of the above referenced activities were done with secrecy and attempted to be covered up.

- Conner requested the opportunity to meet to discuss her business plan, but was denied the opportunity.

2. Statistical evidence

Conner also presented statistical evidence of age discrimination by State Farm as part of her circumstantial evidence. *Barnes v. General Corp. Inc.*,

896 F.2d 1457 (6th Cir. 1990). "Statistical evidence has long been considered an important tool for placing seemingly in-offensive employment practices in their proper perspective." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 527 (6th Cir. 1976). Conner's statistical evidence consisted of a large sample (2,225 applicants) that indicated that applicants over forty (40) were half as likely to be successful as applicants under forty (40). State Farm presented no evidence that refuted the significant disparity by attacking the methodology or the explanatory power of the statistical analysis. They failed to refute this evidence in any fashion.

Pursuant to the record, there is sufficient evidence for a reasonable factfinder to conclude that State Farm discriminated on the basis of age when it declined to allow Conner to advance in the candidate pool and that she has presented sufficient evidence to indict the credibility of State Farm and thus her case should have been allowed to proceed to a jury trial.

3. Weighing of evidence by trial court

The Sixth Circuit acknowledges that the district court engaged in impermissible weighing of the evidence at the summary judgment stage. In this weighing of State Farm's interview methodology, the district court determined that the decision was fair and impartial. The weighing of the reasonableness of this decision clearly should be left to the trier of fact. This is a genuine issue of material fact that a jury should have been allowed to consider.

The Court further acknowledges that State Farm's hiring process was subjective and that subjective

processes provide a ready mechanism for discrimination. *Grano v. Dep't of Dev.*, 699 F.2d 836 (6th Cir. 1983). Conner's submitted evidence and State Farm's sketchy memory regarding the subjective criteria that was used was a disguise for discriminatory action by State Farm. The appellate court permitted State Farm's business judgment to act as an absolute defense to unlawful discrimination. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003). The court's purpose of preventing unlawful hiring practices is frustrated if it allows State Farm to hide behind its subjective hiring process without allowing a jury to determine the reasonableness of that business judgment.

In considering a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. The central issue on a motion for summary judgment is whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Wexler v. White's Furniture, Inc.*, supra. The evidence in this case was not so one-sided that State Farm must prevail as a matter of law. Clearly the Conner presented and the evidence supported sufficient disagreement to require submission of the case to a jury. It was error by the district court to deny the submission of the case to the jury and error by the appellate court to affirm that decision.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 08a0192n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 06-5483, 06-5852

[Filed April 9, 2008]

KATHY CONNER,

Plaintiff-Appellant Cross-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

BEFORE: KEITH, BATCHELDER, and MOORE, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Plaintiff Kathy Conner appeals the district court's grant of summary judgment in favor of Defendant State Farm Mutual Automobile Insurance Company ("State Farm") and the denial of her Rule 59(e) Motion to Alter or Amend the Judgment. Conner brought suit against State Farm, alleging that State Farm violated Kentucky's Civil Rights Act, KY. REV. STAT. § 344.040(1), by discriminating against Conner on the basis of age when State Farm did not accept Conner into its candidate pool for agent positions. State Farm appeals the district court's grant of $8,860.00 in attorney's fees to Conner for State Farm's violation of discovery rules. For the following reasons, we AFFIRM the judgment of the district court.

I. BACKGROUND

Conner began working as an office manager for a State Farm agent in 1981. In October 2002, Robert Teague, the State Farm agent at that time, decided to step down from his position. Conner informed Teague that she wanted to apply for his position as an agent in either the Albany or Burkesville, Kentucky, office.

State Farm had a multi-stage selection process by which it selected a pool of approved candidates who could become State Farm agents. Following a screening phase, selected candidates participated in a panel interview, during which seven panelists evaluated each candidate in light of nine competencies, ranging from "taking charge and leading" to "motive to be a State Farm agent." After the panelists scored the candidate in each of these categories, State Farm transferred the scores and comments onto a single

"Group Average Scoring Sheet"—or summary score sheet—and calculated the candidate's average score in each category.

Dan Brooks, one of the seven panelists and State Farm's Vice-President of Agency, then reviewed the summary score sheet for each candidate and, based on both the summary score sheet and his impression of the candidates from the interview, he determined which individuals would continue with State Farm's agent approval process. Because the panelists scored each candidate on a scale of one to five, with five being the best score, an average score below three raised a "red flag." Brooks indicated that, under those circumstances, he would often review an individual's file, but normally he based his decision solely on the interview and the resulting scores.

A candidate who advanced out of the panel interview entered the candidate pool and was eligible to apply for job openings in the State Farm system. Once a person obtained a posting and successfully completed training, the person became an independent contractor agent for State Farm.

Conner and fourteen other candidates went through the screening process and panel interview at the same time. State Farm did not select Conner, who was 47, to enter the approved-candidate pool. Conner learned that the candidates State Farm approved to enter the applicant pool were younger than Conner and that the position in Albany (at the agency where Conner worked) went to Lisa Beard, age 36, and the position in Burkesville went to Wade Flowers, age 35.

Conner's average scores from the panel interview ranged from 1.6 to 4. Her overall average score for all nine competencies was 2.33. In contrast, Beard outscored Conner in 8 out of the 9 competencies and obtained an overall average score of 3.76. Flowers outscored Conner in all nine competencies and obtained an overall average score of 4.2. The other successful candidates received overall average scores of at least 3.71 up to 4.46. Of the unsuccessful candidates, all but two received overall average scores under 3.0.

Following State Farm's decision, Conner resigned from her position in the Albany office and brought suit against State Farm. State Farm removed the case to federal court citing diversity jurisdiction, and then moved for summary judgment on Conner's age discrimination claim. Initially, the district court found that Conner had established a *prima facie* case of age discrimination and that State Farm had articulated a legitimate explanation for not accepting Conner into its pool of approved candidates. The court denied summary judgment, however, finding that Conner had established a genuine issue of material fact on the issue of pretext. Because the court did not have Beard's and Flowers's score sheets (or the sheets of any other successful or unsuccessful candidate from Conner's applicant pool) from the panel interview, the court determined that it could not review how and why State Farm reached the decision it did.

State Farm filed its trial brief, which the district court treated as a renewed motion for summary judgment, and provided the court with the summary score sheets for all of the candidates interviewed at the

same time as Conner. The court then granted summary judgment in favor of State Farm, finding that Conner had not provided evidence from which a jury could find that State Farm's articulated reason for not selecting Conner was pretextual. Conner subsequently filed a motion to alter the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The district court denied the motion. The district court, however, granted Conner's motion for attorney's fees based upon State Farm's failure to provide the candidates' summary score sheets earlier in discovery. Conner timely appealed the grant of summary judgment in favor of State Farm and the court's denial of her Rule 59(e) motion. State Farm timely appealed the district court's award of attorney's fees to Conner.

II. ANALYSIS

A. Age Discrimination Claim

We review *de novo* the district court's grant of summary judgment. *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 506 (6th Cir. 2006). "Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law." *Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 363 (6th Cir. 2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); FED. R. CIV. P. 56(c)).

Kentucky's Civil Rights Act provides that it is unlawful for an employer "[t]o fail or refuse to hire,...

or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's ... age forty (40) and over." KY. REV. STAT. § 344.040(1). Kentucky courts apply the *McDonnell Douglas* burden shifting framework, *see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 (1973), when the plaintiff seeks to establish discrimination through circumstantial evidence. *See Williams v. Wal-Mart Stores, Inc.,* 184 S.W.3d 492, 495 (Ky. 2005).

The parties do not dispute that Conner established a *prima facie* case of age discrimination or that State Farm articulated a legitimate, non-discriminatory basis for its decision not to select Conner as an approved candidate. The issue before us is whether Conner presented evidence sufficient to permit a jury to find that State Farm's stated basis for eliminating her from its selection process was pretext for unlawful age discrimination. Conner can demonstrate pretext by showing that State Farm's reasons for not selecting her as an approved candidate "(1) had no basis in fact, (2) did not actually motivate its [challenged] conduct, or (3) were insufficient to warrant the challenged conduct." *Browning v. Dep't of the Army,* 436 F.3d 692, 695 (6th Cir. 2006); *Williams,* 184 S.W.3d at 497. Conner must, therefore, "set forth evidence from which a reasonable juror could reject [State Farm's] explanations for its failure [to select Conner as an approved candidate] and infer that [State Farm] instead made its decision on the basis of [Conner's] age." *Browning,* 436 F.3d at 696.

Conner attempts to show pretext by (1) establishing that she is more qualified than Beard or Flowers; (2)

providing statistical evidence demonstrating that State Farm discriminates against older applicants; (3) alleging that State Farm engaged in preferential treatment of the younger applicant Beard; and (4) arguing that Brooks failed to rely on objective criteria in reaching his decision as to who advanced on to the approved-candidate pool. After reviewing the record as a whole, we conclude that the district court did not err in finding that Conner failed to demonstrate pretext.

First, to establish that she is more qualified than Beard or Flowers, Conner cites her 20 plus years of experience working in the insurance industry. She concedes, however, that because State Farm did not require past State Farm or even relevant industry experience in order to be considered for the approved-candidate pool, her past experience was not critical to the application process. She also relies on several affidavits that her former work colleagues submitted on her behalf. In each affidavit, the affiant rates Conner based on the same competencies considered during the panel interview. Her former colleagues all gave Conner much higher marks than the ones she actually received at the panel interview. Conner, however, offers no evidence to substantiate her claim as to her qualifications beyond her own beliefs (and those of her former colleagues, none of whom worked for State Farm in an evaluative position). But Conner's "subjective view of [her] qualifications in relation to those of the other applicants, without more, cannot sustain a claim of discrimination." *Briggs v. Potter*, 463 F.3d 507, 516 (6th Cir. 2006) (internal punctuation and citation omitted); *see also Kentucky Ctr. for Arts v. Handley*, 827 S.W.2d 697, 701 (Ky. Ct. App. 1991) (a plaintiff's

belief as to her qualifications is not relevant; rather, the inquiry is whether the plaintiff established that "discriminatory intent" motivated the defendant's decision).

Second, Conner argues that the statistical evidence she presented before the district court establishes State Farm's discriminatory intent. The statistical analysis considered an applicant pool of approximately 2,500 applicants for State Farm agency positions in Ohio, Kentucky, and Tennessee, and, according to Conner, established that State Farm hired more under-40 non-State Farm employees than over-40 non-State Farm employees.[1]

"Appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990). To create such an inference, however, "the statistics must show a significant disparity and eliminate the most common nondiscriminatory explanations for the disparity." *Bender v. Hechi's Dep't Stores,* 455 F.3d 612, 622 (6th Cir. 2006) (quoting *Barnes,* 896 F.2d at 1466). Conner's statistical analysis does little to support her position because (1) it fails to eliminate the most common nondiscriminatory explanations for the disparity, such as differences in skills or education, and (2) the

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[1] Although Connor worked as an office manager in Teague's office, she was not a State Farm employee, and so she falls into the over-40 non-State Farm employee category.

analysis is not limited to decisions made by Dan Brooks-the primary decision-maker here. The data does not support an inference that State Farm discriminates against persons 40 and over.

Third, Conner argues that State Farm undertook preferential treatment to aid Beard, one of its younger applicants. After the selection process began, Beard met separately with Ralph Dillahay, who participated in the panel interviews, and with Teague. Both Dillahay and Teague recommended that Beard view tapes of a motivational speaker, presumably to help prepare Beard for the panel interview. Conner, however, has offered no evidence that *Brooks,* the decision-maker here, gave any preferential treatment to Beard. Even though Beard received some help from Dillahay and Teague, this treatment does not establish that State Farm's decision not to select Conner, or the other six unsuccessful candidates-all of whom were under the age of 40-was motivated by unlawful discrimination.

Finally, Conner argues that the district court improperly made two factual findings that should have gone to a jury, namely, that State Farm's business decision not to hire Conner was based on "objective criteria" and that State Farm's business judgment here was reasonable.

We agree that State Farm's hiring process was subjective, rather than objective, but this does not mandate reversal. While we have recognized that "subjective evaluation processes intended to recognize merit provide ready mechanisms for discrimination," they "are not illegal per se." *Grano v. Dep't. of Dev.*,

699 F.2d 836, 837 (6th Cir. 1983). Rather, "[t]he ultimate issue in each case is whether the subjective criteria were used to disguise discriminatory action." *Id.* (citing *Ramirez v. Hofheinz,* 619 F.2d 442, 446 (5th Cir. 1980)). In fact, "[q]uestioning [the decision-maker's] hiring criteria is not within the province of this court, even if [the decision-maker's] hiring process was entirely subjective." *Browning,* 436 F.3d at 698. Additionally, Kentucky courts have also concluded that an employer retains discretion in choosing among qualified candidates, and subjective factors, such as "[a]ttitude, commitment to the work, flexibility, and other nondiscriminatory criteria are legitimate reasons for failure to hire ... an individual." *Handley,* 827 S.W.2d at 700 (citing *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.,* 783 F.2d 50 (6th Cir. 1986)). While Conner understandably dislikes the selection process State Farm used, she offers no evidence to establish that State Farm, through its subjective criteria, acted with a discriminatory motive or that its subjective criteria disguised discriminatory action.

Conner also argues that the district court overstepped its bounds by examining the reasonableness of State Farm's business decision as to Conner and concluding that it was in fact reasonable. While "[a]n employer's business judgment ... is not an absolute defense to unlawful discrimination[,] .... the reasonableness of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation." *Wexler v. White's Fine Furniture, Inc.,* 317 F.3d 564, 576 (6th Cir. 2003). That is, the district court cannot

simply invoke the business judgment rule "to exclude consideration of evidence relevant to the question of pretext." *Id.* at 577; *see also Simms v. Okla. ex rel. Dep't. of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) ("Our role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgments."). Despite Conner's quarrel with the district court's finding of reasonableness, we conclude that the district court undertook the proper analysis and considered whether Conner proffered any evidence to rebut State Farm's non-discriminatory reason for not moving her into the next phase of the hiring process, and simply found that Conner produced no evidence from which a reasonable jury could conclude that State Farm's proffered reason constituted a pretext for illegal age discrimination. Our review of the record persuades us that the district court was correct. The district court did not err in granting summary judgment to State Farm.

B. Rule 59(e)

"Ordinarily, we review a denial of a motion to alter or amend a judgment, pursuant to Federal Rule of Civil Procedure 59(e), for abuse of discretion[;] .... [w]hen, however, a Rule 59(e) motion seeks reconsideration of a grant of summary judgment, we conduct *de novo* review." *Hansmann v. Fid. Invs. Institutional Servs. Co.*, 326 F.3d 760, 766-67 (6th Cir. 2003) (internal punctuation and citations omitted). A district court may grant a Rule 59(e) motion to alter or amend a judgment if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *See*

Gencorp, Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999).

In her motion to alter, Conner argued that the district court could not have viewed the facts in a light favorable to the non-moving party because the court concluded that State Farm's "methods to interview the candidates were fair and impartial." Further, Conner contended that the court did not properly consider all of Conner's circumstantial evidence of discrimination when the court concluded that State Farm exercised a legitimate business decision in not advancing Conner to the applicant pool. Conner also questioned the district court's reliance on several cases concerning how the court should address State Farm's business decision.

We affirm the district court's denial of Conner's 59(e) motion. While the district court's statement that State Farm's interview methodology was fair and impartial suggests a weighing of the evidence inappropriate at the summary judgment stage, we reiterate our previous conclusion that Conner failed to present evidence sufficient to permit a jury to find that this business decision was a pretext for unlawful age discrimination. Moreover, Conner's argument that the district court should have reconsidered the circumstantial evidence she offered is not a proper basis upon which to alter or amend a judgment. Finally, the district court did not err in considering the cases which it cited in its opinion.

C. Attorney's Fees

State Farm appeals the district court's award of attorneys' fees to Conner pursuant to Federal Rule of Civil Procedure 37 for State Farm's failure to provide timely discovery. We review such a sanction for abuse of discretion. *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994). "An abuse of discretion occurs when (1) the district court's decision is based on an erroneous conclusion of law, (2) the district court's findings are clearly erroneous, or (3) the district court's decision is clearly unreasonable, arbitrary or fanciful." *Id.* The record before us does not support the conclusion that the district court clearly erred in its findings of fact regarding discovery, or that the district court's decision is based on any erroneous conclusion of law or is unreasonable or arbitrary. We find no abuse of discretion here.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** in its entirety the judgment of the district court.

KAREN NELSON MOORE, Circuit Judge, dissenting in part and concurring in part. I write in dissent because I believe that Conner has created a genuine issue of material fact that State Farm's proffered legitimate rationale for not advancing her to the insurance-agent candidate pool was a pretext for age discrimination. I also think that Conner has presented evidence sufficient for a reasonable factfinder to conclude that she has proven her case under a mixed-motive standard of analysis. I concur in Part II.C. of the majority opinion and agree that the

district court did not abuse its discretion in awarding attorney's fees to Conner.

I. GENUINE ISSUE OF MATERIAL FACT REGARDING PRETEXT

Conner has presented statistical evidence of age bias in State Farm's hiring practices as well as circumstantial evidence regarding the subjective character of State Farm's hiring procedures, the preferential treatment shown a younger employee in competition for the jobs she sought, and her own qualifications. "Generally, at the summary judgment stage, a plaintiff's burden is merely to present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action 'under circumstances which give rise to an inference of unlawful discrimination.'" *Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 364 (6th Cir.), (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)), *cert. denied*, --- U.S. ----, 128 S. Ct. 201 (2007). The same standards of interpretation apply to Kentucky's Civil Rights Act, KY. REV. STAT. § 344.040(1), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *Ammerman v. Bd. of Educ.*, 30 S.W.3d 793, 797-98 (Ky. 2000). In this case, enough evidence exists for a reasonable factfinder to conclude that State Farm discriminated on the basis of age when it declined to allow Conner to advance to the candidate pool.

The majority opinion and I agree that Conner has established a prima facie case of age discrimination; we differ on the issue of pretext. To prove pretext, Conner must show that State Farm's proffered

legitimate reasons for failing to advance her as a candidate "had no basis *in fact*;" "did not *actually* motivate" State Farm's decision; or "were *insufficient* to motivate" the decision. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Here, Conner argues under the second method of demonstrating pretext that her age, and not State Farm's belief that Beard was more qualified than she, explains her lack of success in the application process. Conner must "indict the credibility of [her] employer's explanation by showing circumstances which tend to prove that an illegal motivation was *more* likely than that offered by the defendant." *Id.*

Under both Kentucky and Sixth Circuit precedent, a plaintiff may use statistics to show that an employer's proffered rationale for an adverse employment action is a pretext for discrimination. *Kentucky Ctr. for the Arts v. Handley,* 827 S.W.2d 697, 701 n. 5 (Ky. Ct. App. 1991); *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 524 (6th Cir. 1997). "Statistical evidence is an important tool for placing seemingly in-offensive employment practices in their proper perspective." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 527 (6th Cir.), *cert. denied,* 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976). To serve this function, "both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination." *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (6th Cir. 1987) (quoting *Segar v. Smith,* 738 F.2d 1249, 1274 (D.C. Cir. 1984)).

To demonstrate a "pattern of conduct toward a protected class as a group [people over forty]," Conner's evidence must be sufficiently powerful to

"create an inference that [State Farm] discriminated against [an] individual member[] of the class." *Bender v. Hechi's Dep't Stores,* 455 F.3d 612, 622 (6th Cir. 2006), *cert. denied,* --- U.S. ----, 127 S.Ct. 2100, 167 L.Ed.2d 814 (2007). "[T]he statistics must show a *significant disparity* and eliminate the most common nondiscriminatory explanations for the disparity." *Id.* (quoting *Barnes v. GenCorp Inc.,* 896 F.2d 1457, 1466 (6th Cir.), *cert. denied,* 498 U.S. 878 (1990)). I think that the statistical research conducted by Conner's expert meets this standard. Of the total candidates for the position of State Farm agent, those applicants over the age of forty were only half as likely to be successful as applicants under the age of forty. J.A. at 217 (Friedlander Rpt. Table 1). Candidates over forty who were not State Farm employees at the time of their applications-the category to which Conner belongs-were sixty-seven percent as likely as candidates under the age of forty to be successful.[2] J.A. at 219 (Friedlander Rpt. Table 3).

The majority opinion concludes that the evidence failed to eliminate nondiscriminatory reasons for the disparity, such as a difference in skills that happens to correlate with age. State Farm, however, has provided no explanation for the disparity. Therefore, a factfinder reasonably could conclude that age bias explains the disparity. *Cf. Barnes,* 896 F.2d at 1469 (holding that a defendant could counter statistical

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[2] The expert also compared the success rates of candidates who were State Farm employees at the time of their applications, J.A. at 218 (Friedlander Rpt. Table 2), but this evidence is not directly applicable because Conner does not belong to this category.

evidence used to establish a prima facie case by challenging the statistical method, by attacking the logic of the presumption that discrimination explains the statistical disparity, or by demonstrating "that bias did not play a role in the particular decision to discharge each of the plaintiffs"). Given that State Farm has not offered an alternative explanation for the age disparity in its hiring results, "it is reasonable to presume ... that skill is distributed randomly over any given age group." *Id.* at 1466.The statistical evidence does not suffer from any of the common flaws we have identified in other cases, such as too small a sample size. *Cf. Simpson,* 823 F.2d at 943 (finding "suspect" a plaintiff's reliance on a seventeen-person sample pool). The statistical evidence, combined with the other evidence Conner presents, thus creates an inference of discrimination.

Conner also points to the subjective nature of the criteria that State Farm uses to hire insurance agents. Although "[s]ubjective employment evaluations ... are not illegal per se," in *Grano v. Department of Development* we "noted that subjective evaluation processes intended to recognize merit provide ready mechanisms for discrimination." 699 F.2d 836, 837 (6th Cir. 1983). In *Grano,* we reviewed the district court's factual findings underlying its conclusion that the employer had not discriminated on the basis of sex for clear error; in this case, we are reviewing the grant of summary judgment to State Farm de novo. While we cannot question State Farm's hiring criteria, I believe that Conner has presented sufficient evidence for a reasonable factfinder to conclude that State Farm "used subjective criteria to mask a discriminatory motive." *See Browning v. Dep't of Army,* 436 F.3d 692,

698 (6th Cir. 2006). The majority opinion concludes otherwise, but mistakenly looks to Conner's discussion of the subjective criteria to determine whether that evidence can independently establish discriminatory motive. Instead, I think that evidence regarding State Farm's subjective hiring process must be viewed in conjunction with the statistical evidence showing an age disparity in the results of that process, as well as evidence that State Farm showed preferential treatment toward Conner's younger competitor. From that perspective, the evidence regarding State Farm's subjective criteria helps to create a genuine issue of material fact with respect to pretext.

The majority opinion dismisses Conner's evidence of the preferential treatment that Dillahay and Teague showed Beard on the basis that Conner did not also show that Brooks exhibited the same preferential treatment. Brooks was certainly the final decisionmaker regarding whether an applicant made it to the candidate pool; however, Brooks depended on the rating scores given Conner by Dillahay and other interviewers. J.A. at 65-66 (Brooks Dep. at 8-12). These interviewers thus constituted initial decisionmakers in the hiring process. Because of Brooks's reliance on their scoring, the judgment of the initial decisionmakers was equally significant to the final hiring decision as Brooks's own judgment. State Farm argues that these interviewers could not have discriminated on the basis of age because several of them were themselves over forty. Sitting en banc, we have "explicitly rejected," however, "the idea that one member of a group is unlikely to discriminate against another member of the same group." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 574 (6th Cir. 2003)

(en banc) (relying on *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)).

Conner presents evidence that a reasonable factfinder could view as showing that at least one interviewer, as well as Teague, may have favored Beard over Conner because of Beard's younger age. Dillahay invited Beard to his office for a half-hour discussion regarding her application and recommended motivational-speaking instruction videos that could aid her in delivering her business-plan presentation, a critical component of the application process. J.A. at 374-78 (Beard Dep. at 9-13). This kind of selective tutoring of a younger worker in the hiring process, to the disadvantage of an older competitor, can serve as evidence of pretext. *See, e.g., Goden v. Runyon,* 885 F.Supp. 1104, 1108-09 (W.D. Tenn. 1995). In addition, Teague had spoken with Beard well before the hiring process about the possibility of her becoming a State Farm agent. J.A. at 421-22 (Teague Dep. at 12-13). A reasonable factfinder could conclude that Dillahay and Teague had previously identified Beard as a competitive candidate and Conner as a weak candidate. While preselection of a candidate based on that candidate's qualifications does not violate Title VII. "[e]vidence of preselection operates to discredit the employer's proffered explanation for its employment decision ... [and] is relevant evidence of the employer's motivation." *Goostree v. Tenn.*, 796 F.2d 854, 861 (6th Cir. 1986), *cert. denied,*480 U.S. 918 (1987).

Although Conner's subjective view of her own qualifications, without more, cannot substantiate her discrimination claim, *Briggs v. Potter,* 463 F.3d 507, 516 (6th Cir. 2006), Conner also presents evaluations

of her performance by other individuals. Teague testified to Conner's competence in performing her duties as office manager, his reliance on her for input regarding personnel decisions and marketing plans, her skill in training new employees, and her receipt of regular performance bonuses. J.A. at 420-21, 423 (Teague Dep. at 8-9, 11-12, 18). In addition, Conner has presented an extremely positive review of her work by State Farm Agent Elwood Ervin, who supervised Conner's field visit as part of her application process. J.A. 97-101 (Career Understanding Evaluation Form). Conner does not have to prove that she was better qualified than Beard for the position of State Farm agent, only that State Farm discriminated on the basis of age in choosing Beard instead of her. *Patterson v. McLean Credit Union,* 491 U.S. 164, 186 (1989), *overruled on other grounds by* the 1991 Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

The district court based its opinion in large part on the doctrine that a consideration of the fairness of an employer's business judgment cannot enter into the evaluation of pretext. *Brocklehurst v. PPG Indus., Inc.,* 123 F.3d 890, 898 (6th Cir. 1997). "An employer's business judgment, however, is not an absolute defense to unlawful discrimination." *Wexler,* 317 F.3d at 576. Indeed, "the reasonableness of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation." *Id.* In the instant case, a factfinder could consider the reasonableness of State Farm's proffered rationale along with evidence regarding age disparity in State Farm's hiring, the subjective nature

of the hiring process, favoritism shown a younger competitor, and Conner's qualifications. In sum, this is a close case, one "that on its facts could go either way." *See id.* at 578. I therefore think that this is a case that should proceed to trial and that the district court erred in granting summary judgment to State Farm.

II. ANALYSIS OF CONNER'S CASE UNDER THE MIXED-MOTIVE STANDARD

I think that, upon remand, the district court should consider whether to give the jury instructions respecting a mixed-motive as well as those pertaining to a *McDonnell Douglas* standard. I believe that Conner has created a genuine issue of material fact that age-discrimination was a motivating factor in State Farm's decision not to advance her to the candidate pool, even if State Farm would have made the same decision absent this discriminatory motive. In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), the Supreme Court first recognized that both legitimate and illegitimate rationales can motivate employment decisions. A plurality opinion held that when a Title VII plaintiff proved that a protected characteristic "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.* at 258.

Congress limited the "same-decision" defense articulated in *Price Waterhouse* when it passed the 1991 Civil Rights Act ("the 1991 CRA"), which amended Title VII, Pub.L. No. 102-166, § 107, 105

Stat. 1071, 1075-76 (1991) (codified at 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B)). Congress passed the 1991 CRA "in an attempt 'to eliminate the employer's ability to escape liability in Title VII mixed-motive cases by proving that it would have made the same decision in the absence of the discriminatory motivation." *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 711 (6th Cir. 2006) (internal citation omitted). The 1991 CRA provides "that a plaintiff can raise a mixed-motive Title VII claim by 'demonstrat[ing] that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice." *Id.* (quoting 42 U.S.C. § 2000e-2m). If an individual proves a mixed-motive claim, then "the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff ... [to] include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)). "[T]o avail itself of the affirmative defense, the employer must 'demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor.'" *Id.* at 94-95. In the case of *Desert Palace*, the Supreme Court interpreted the 1991 CRA to provide that "direct evidence of discrimination is not required in mixed-motive cases." *Id.* at 101-02. Because we interpret Kentucky's Civil Rights Act consistently with Title VII, we can apply the mixed-motive standard to cases brought under Kentucky's law using circumstantial evidence.

As I have discussed *supra,* Conner has produced statistical and circumstantial evidence regarding age disparity in State Farm's hiring of insurance agents, the use of subjective criteria in the hiring process, possible pre-selection of a younger competitor, and her own qualifications. I think that this evidence, even if it were insufficient to create a genuine issue of material fact that Conner's age constituted the determinative factor in State Farm's employment decision, suffices to create a factual dispute regarding whether age constituted a motivating factor in State Farm's decision. I therefore believe that the district court's grant of summary judgment to State Farm should be reversed and the case remanded for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CASE NO.: 1:03cv195-R

[Filed June 12, 2006]

KATHY CONNER,
PLAINTIFF

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
DEFENDANT

MEMORANDUM OPINION

This matter comes before the Court on the Plaintiff's Motion to Alter the Judgment (Docket #80). The Defendant has responded to the Plaintiff's motion (Docket #81). This matter is now ripe for consideration. For the following reasons, the Plaintiff's Motion to Alter the Judgment is **DENIED**.

PROCEDURAL HISTORY

On February 17, 2006, the Court issued a memorandum opinion (Docket #65) on the Defendant's motion for summary judgment denying the Defendant's motion unless more information came forward regarding the business decision by State Farm Mutual Automobile Insurance Company ("State Farm") concerning the interview process. On April 21, 2006, after receiving the scoring information regarding the interview process, the Court granted the supplemental motion for summary judgment submitted by the Defendant (Docket #78). On May 1, 2006, the Plaintiff filed a motion to alter judgment under FRCP 59(e) arguing that: the Court did not view the facts in a light most favorable the Plaintiff s required by FRCP 56; the Court misconstrued the case law it used when making its determination; and the Court made a factual determination regarding the business judgment of the Defendant that should have been reserved for the finder of fact. The Defendant has filed a response contending that the Plaintiff is attempting to impermissibly reargue their case and that the case law cited by the Court is consistent with its findings as well as the law of Kentucky and the Sixth Circuit Court of Appeals.

STANDARD

The court may grant a motion to alter or amend, pursuant to Federal Rule of Civil Procedure 59(e), "if there is a clear error of law, newly discovered evidence, an intervening change in controlling law or to prevent manifest injustice." *GenCorp v. American International*, 178 F.3d 804, 834 (6th Cir. 1999)

(internal citations omitted). "[C]ourts typically will consider additional evidence accompanying a Rule 59(e) motion only when it has been newly discovered, and that to [c]onstitute 'newly discovered evidence,' the evidence must have been previously unavailable." *GenCorp*, 178 F.3d at 834. A FRCP 59(e) motion to alter does not provide the Plaintiff another opportunity to argue the merits of their case. *GenCorp* at 834.

DISCUSSION

The Plaintiff asserts that the Court did not look at the facts in a light most favorable to the Plaintiff, the non-moving party, as required by FRCP 56 when making its determination. In particular, the Plaintiff argues that the Court made an improper factual determination when it stated that "the methods used to interview the candidates were fair and impartial," and that the Court did not properly take into consideration all of the Plaintiff's circumstantial evidence when the Court held that the Defendant had made a legitimate business decision when it chose not to hire the Plaintiff. The Plaintiff also questions the Court's reliance on *Brocklehurst v. PPG Industries*, 123 F.3d 890 (6th. Cir. 1997) and *Acree v. Tyson Bearing Co., Inc.*, 128 Fed. Appx. 419, 431 (6th Cir. 2005).

It is well-established that "[t]he soundness of an employer's business judgment may not be questioned as a means of showing pretext." *Chappell v. GTE Products Corp.*, 803 F.2d 261, 266 (6th Cir. 1986); *See also Rowan v. Lockheed Martin Energy Systems, Inc.*, 360 F.3d 544, 550 (6th Cir.2004). However, the business judgment of an employer is not an absolute defense to discrimination. *Wexler v. White's Fine*

Furniture, Inc. 317 F.3d 564, 576 (6th Cir. 2003) (citing *E.E.O.C. v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 835 (6th Cir. 1997)). "The reasonableness of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation." *Wexler* at 576 (citing *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir.1998)). However, though the Court may consider the reasonableness of a business decision by an employer, the employee must still put forth sufficient evidence to meet its burden under the *McDonnell-Douglas* analysis. *DePas v. Stocker & Yale, Inc.*, 94 Fed.Appx. 335, 339-340 (6th Cir. 2004).

In the instant matter, the Court did take into consideration the reasonableness of the business judgment of State Farm when it determined that State Farm had made a legitimate business decision regarding its decision not to place Kathy Conner in the approved candidate pool. This is evident from its first memorandum opinion on this matter, where the Court held that it could not grant the Defendant's motion for summary judgment because based on the evidence at that time it could not determine how the Defendant had reached its decision, and the Court could not simply rely on State Farm's assurance that it had made a legitimate business decision. After receiving the interview forms of all the candidates, the Court was able to determine that the Defendant had made a reasonable business decision not to place Conner in the approved candidate pool based on her interview scores compared to others who sought out the same position. Here, the Plaintiff has not put forth sufficient evidence to show pretext in its challenge of the business

decision by State Farm, as required by *DePas*. *DePas* at 339-340. Conner has merely asserted that the interview process was "unfair," but has not offered any direct or circumstantial evidence to support this assumption, and she has therefore not met her burden under *McDonnell-Douglas* shifting burden standard. The Court held that the interview process was "fair" because the Plaintiff did not offer any evidence to suggest what, in particular, about the process was discriminatory. Consequently, the Plaintiff did not show pretext by challenging the business decision of State Farm.

Further, as mentioned *supra*, a FRCP 59(e) motion to reconsider does not permit a party to reargue their case on the merits; however, the Plaintiff attempts to have to Court reconsider its circumstantial evidence by listing six (6) points she feels supports her case to show pretext on the part of the Defendant. The Court determined that the circumstantial evidence offered by the Plaintiff did not raise an inference that the age of Conner was the reason behind the decision not to hire her, in light of her performance during the interview compared to the other candidates. Accordingly, the Court will not reconsider the circumstantial evidence offered by Conner, or its decision that Conner has not demonstrated pretext.

Lastly, the reliance by the Court on *Brocklehurst* and *Acree*, two (2) Sixth Circuit Court of Appeals decisions, was not in error as suggested by the Plaintiff. In citing those two (2) cases, the Court took into consideration the application of a federal law by the higher court in order to determine how the Court should follow the law as held by the Sixth Circuit

Court of Appeals. The Court did not consider nor compare the facts in those matters to the instant case, nor did the Court attempt to apply the state law of Michigan to the case at hand. Accordingly, Conner's assertion that the Court misapplied precedent, which it is bound to follow, is a misguided argument that fails as both a matter of law and application.

CONCLUSION

For the foregoing reasons, the Plaintiff's Motion to Alter Judgment is **DENIED**.

An appropriate order shall issue.

June 12, 2006

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CASE NO. 1:03CV-195-R

[Filed April 24, 2006]

KATHY CONNER	)
PLAINTIFF	)
	)
v.	)
	)
STATE FARM MUTUAL AUTOMOBILE	)
INSURANCE COMPANY	)
DEFENDANT	)
	)

MEMORANDUM OPINION

This matter comes before the Court on the Defendant's renewed motion for summary judgment (Docket #71). The Plaintiff has responded to this motion (Docket #75), and the Defendant has replied to that response (Docket #77). This matter is now ripe for adjudication. For the following reasons, the Defendant's motion for summary judgment is **GRANTED**.

BACKGROUND

The basic facts underlying this litigation have not changed since the Court's initial memorandum opinion on this matter, dated February 8, 2006 (Docket #42). The facts were stated as follows:

"This matter involves an employment dispute over whether or not the Defendant discriminated against the Plaintiff on the basis of age when the Defendant selected younger candidates to fill two open vacancies. In early 2003, the Plaintiff, Kathy Conner ("Conner") was employed by the Robert Teague ("Teague") State Farm Agency ("Teague Agency"). At that time she was forty-seven (47) years old, and had been working for a State Farm Agency since 1981. During those last eight (8) years (1995-2003) Conner served as an Office Manager for the Teague Agency, though she had performed similar duties before 1995. These duties included: discussing marketing plans with Teague; training new employees; dealing with customers; and holding licenses to sell state life, health, property and casualty insurance.

By October 2002, Teague had notified the Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), that he would retire as an approved candidate to be an agent for the Defendant in 2003. Conner informed Teague that she wanted to apply for his position as an agent in either the Albany or Burkesville offices. Ultimately, the positions went to Lisa Beard ("Beard"), age thirty-six (36), and Wade Flowers ("Flowers"), age thirty-five (35), respectively. Conner argues that this happened because of age discrimination.

State Farm has an in depth selection and screening process to determine approved candidates who may become State Farm agents. Conner was invited by State Farm to participate in this process that takes place over the course of several months. The process starts with a "screening phase," which includes completion of a background check, credit check, and the submission of a written career profile. Conner passed the initial screening process and advanced to the candidate approval phase. Conner completed all of the exercises of this phase that included the agency field visit, preparing a business plan and community profile, submitting an autobiography, and completing a personal financial statement and balance sheet. State Farm also looked for eleven (11) qualities when assessing these projects. By all accounts, Conner did well in the screening phase and the events leading up to panel interview. State Farm concluded the process with forty-five (45) minute panel interview where they evaluated nine (9) competencies.

During her interview, which was overseen by State Farm Vice President of Agency, Dan Brooks ("Brooks"), Conner did not use a Powerpoint, though she claims she was told she did not have to use it. In addition, she was told that she appeared "nervous" and could have come off stronger. As mentioned, State Farm decided not to hire Conner for the position with the main reason being State Farm felt that Conner's performance during the interview was "below par." State Farm also felt that Conner needed to "grow" in the areas of: leadership skills; business savvy; interview skills; competition and drive. At this point, Conner recognized that the agents hired by State Farm were younger. In addition, after the hiring

process, State Firm asked Conner to help train Beard in running the agency.

Conner alleges that Teague as well as Ralph Dillahay ("Dillahay"), another State Farm employee, assisted Beard during the selection process by helping her prepare for her interview and her business plan. Conner claims that Teague would not help her with her business plan and during the course of the selection process did not offer her much assistance. The interview was over seen by Brooks. Based on that interview and all the other phases of the selection process Brooks made the final decision as to whether the applicant would be accepted as an approved candidate. Scoring sheets with set criteria were used by the panel to grade the applicant in certain areas, rating them with a number of one (1) through five (5), with one (1) being the lowest and five (5) the highest. An average score below three (3) raised a "red flag," but the Brooks said he would also look to the other phases in the selection process should that happen. The individual and collective scoring sheets of Conner are available, however, unexplainably, the individual and collective interview sheets for Beard and Flowers are not available. Conner's sheets indicate that she was evaluated collectively at an average below three (3).

Conner argues that the reason she did not get the agency intern position was because of her age. She notes that she had more hands-on experience. Additionally, when Conner worked at another field station in Tennessee State Farm Agent Elwood Erwin ("Erwin") during the selection process, he had nothing but positive comments to say about her. Erwin noted

that "[y]ears of experience showed through. She has no reluctance." After not receiving the position Conner brought an age discrimination suit against State Farm pursuant to the Kentucky Civil Rights Act, KRS §344.040(1). State Farm denies this claim arguing that the Plaintiff was not "otherwise qualified," and even if she was, State Farm had a legitimate non-discriminatory reason for its business decision. The Plaintiff counters this argument by State Farm arguing there is no evidence that the other applicant were equal or better qualified than her, and she has offered statistical analysis in attempt to demonstrate the age discriminatory tendencies of State Farm. State Farm argues that the statistics fail to raise a genuine issue of fact that Conner's non-selection was age-based."

In its memorandum opinion, the Court also stated:

> [s]hould evidence concerning the individual rating forms of Beard and Flowers from their interviews appear at the close of evidence, the Court would likely reexamine its present decision at that juncture. Without this evidence, and looking at the facts in a light most favorable to the non-moving party, a genuine issue of fact exists as to whether or not the decision not to hire Conner was pretextual.

Since the Court issued its opinion, State Farm has submitted records concerning the rating forms of Beard and Flowers, as well as the other successful and unsuccessful candidates during the interview process. Of the nine categories (including: 1) taking charge; 2) driving results; 3) managing time; 4) influencing

others; 5) coachability; 6) doing the right thing; 7) independence and self-reliance; 8) self-confidence; and 9) motive to be a State Farm Agent) where State Farm judged the candidates during their interviews, Connor averaged the following scores: 1,7; 2; 2.3; 2.3; 3.3; 4; 2.1; 1.7 and 1.6. In comparison, Lisa Beard averaged: 3.9; 3.9; 3.7; 3.3; 3.9; 3.9; 3.9; 4 and 3.3, scoring higher than Connor in 8/9 categories. Wade Flowers, the other candidate who received a position desired by Connor, averaged: 4.1; 3.9; 4.3; 4; 3.7; 5; 3.9; 4; and 4.9, scoring higher than Connor in all nine categories.

STANDARD

Summary judgment is available under Fed. R. Civ. P. 56(c) if the moving party can establish that the "pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The test is "whether the party bearing the burden of proof has presented a jury question as to each element in the case." *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). The plaintiff must present more than a mere scintilla of the evidence. To support his position, he

must present evidence on which the trier of fact could find for the plaintiff. *See id.* (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986)). Mere speculation will not suffice to defeat a motion for summary judgment: "[t]he mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Monette v. Electronic Data Systems Corp.*, 90 F. 3d 1173, 1177 (6th Cir. 1996). Finally, while Kentucky state law is applicable to this case pursuant to *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), a federal court in a diversity action applies the standards of Fed. R. Civ. P. 56, not "Kentucky's summary judgment standard as expressed in *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, Ky., 807 S.W.2d 476 (1991)." *Gafford v. General Electric Co.*, 997 F.2d 150, 165 (6th Cir. 1993).

DISCUSSION

In taking into account the previous analysis by the Court in its initial memorandum opinion, the only issue remaining for the Court to address in the renewed motion for summary judgment is the final step of the *McDonnell Douglas* standard, which analyzes whether the Plaintiff can show that she is the victim of intentional age discrimination by demonstrating that State Farm's reasons not to hire her were pretextual discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973); *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226, 230 (Ky. App. 1984); *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 700-701 (Ky. App. 1991). State Farm argues that Conner cannot challenge the

business judgment of Brooks to demonstrate pretext. State Farm cites the case of *Brocklehurst v. PPG Indus.*, where the Sixth Circuit Court of Appeals held that it was incorrect to allow a jury to judge the fairness of a business decision by the employer when considering whether or not the employer had pretext in allegedly discriminating against the plaintiff. *Brocklehurst v. PPG Indus.*, 123 F.3d 890, 898 (6th Cir. 1997). In *Acree v. Tyson Bearing Co., Inc.*, the Sixth Circuit again gave deference to the business judgment of an employer in the context of a discrimination case, stating, "[p]laintiffs, however, may not prove pretext by attacking the soundness of an employment decision."*Acree v. Tyson Bearing Co., Inc.*, 128 Fed. Appx. 419, 431 (6th Cir. 2005).

In its initial memorandum opinion, the Court held:

> [t]he Court does not challenge the business decision by State Farm, however, the Court cannot sustain that decision without evidence as to how and why they reached that decision. The evidence requires more than the testimony of Brooks, whose memory, arguably, was not the most accurate at times during his deposition. State Farm has evidence corroborating the poor performance of Conner during her interview, but they also have evidence corroborating her good performance prior to the interview throughout the selection process. There is no corroboration of evidence that the other candidates were "better" or "equally" qualified as Conner, nor is there any evidence as to their performances during the selection process.

The interview scoring sheets of the other candidates, including Beard and Flowers, submitted by the Defendant allows this Court to conduct a complete and thorough review of State Farm's decision not to hire Connor. In doing so, the scoring sheets indicate that State Farm made a legitimate business decision not to hire Connor based on her score on the interview in comparison to the successful applicants.

On average, during the interview, Beard and Flowers scored much higher than Connor in almost all areas, with Connor only beating out Beard in one (1) out of the nine (9) possible scoring categories, by 0.1 points. Further, in comparison to the other six (6) successful applicants selected with Beard and Flowers, Connor's average scores are substantially lower in almost all of the areas. This evidence suggests that State Farm's decision not to hire Connor was a legitimate business decision that was not premised on pretextual age discrimination.

In its response to State Farm's renewed motion for summary judgment, Connor asserts that State Farm demonstrated pretext by: attacking the methods by which State Farm scored the candidates; the fact that State Farm has not produced the individual rating sheets of the winning candidates, only the collective average scoring sheets; the fact that none of the candidates who were over 40 were approved; and puts forward once again Connor's qualifications. Though all of these arguments go to supporting Connor's argument to the issue of pretext, these arguments do not counter the legitimate business reason offered by State Farm in not hiring the Plaintiff, which was that Connor did not score as well in the interview as Beard

and Flowers. The methods used to interview the candidates were fair and impartial, and in no way demonstrate a pretext for age discrimination. Further, the average scores of the candidates alone support the legitimate reason offered by State Farm in its decision not to hire Connor based on the interview because they show the blatant scoring discrepancy between Connor and the successful applicants. Connor was the only candidate who was over 40 when she interviewed, so the fact that no other protected individuals were hired does not show a pretext for age discrimination.

Finally, though Connor does have good credentials and experience working for State Farm agencies, State Farm put a strong emphasis on the interview process for the applicants. In its previous opinion, the Court held that the scores of the other candidates would be deciding factor as to whether or not Connor could satisfy her burden. Though State Farm was not forthcoming in producing these documents, these documents have nonetheless turned up, and they undoubtedly support the legitimate non-discriminatory business decision of State Farm not to hire Connor. Accordingly, the reasons for the decision not to hire Connor were not a pretext for age discrimination. Simply put, the decision not to hire Connor was a business decision of State Farm based on objective criteria.

CONCLUSION

For the foregoing reasons as well as the previous memorandum opinion submitted by the Court, the Defendant's renewed motion for summary judgment is **GRANTED**.

An appropriate order shall issue.

April 21, 2006

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 06-5843/06-5852

[Filed May 8, 2008]

KATHY CONNER,	)
	)
Plaintiff - Appellant Cross-Appellee	)
	)
v.	)
	)
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)
	)
Defendant - Appellee Cross-Appellant	)
	)

ORDER

BEFORE: KEITH, BATCHELDER, and MOORE, Circuit Judges.

Upon consideration of appellant cross-appellee's motion for an extension of time to file a petition for panel rehearing out of time, it is **ORDERED** that the motion be and it hereby is **GRANTED**.

It is further **ORDERED** that appellant cross-appellee's petition for panel rehearing is **DENIED**.

Judge Moore would accept for filing and continue to adhere to her opinion.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

Issued: May 08, 2008